

Office - Supreme Court, U. S.

FILED

FEB 11 1944

CHARLES ELMORE DUFFLEY  
CLERK

IN THE  
**Supreme Court of the United States**  
FEBRUARY TERM, 1944

No. 690

MAX KAPLAN and JACOB KAPLAN, co-partners, doing business under the firm name and style of KAPLAN BROS.,

Petitioners,

*against*

NATIONAL LABOR RELATIONS BOARD,

Respondent,

---

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

---

---

HERBERT L. WASSERMAN,  
Attorney for Petitioners.

---

---



# INDEX

## PETITION FOR WRIT OF CERTIORARI

	PAGE
Summary Statement of Matter Involved .....	2
Jurisdiction .....	7
Questions Presented .....	7
Reasons for Granting the Writ .....	7

## BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below .....	11
Jurisdiction .....	11
Statement of the Case .....	11
Specification of Errors .....	13
Statute Involved .....	14
Summary of Argument .....	15

POINT I—The petition presents an important question of Federal law, involving the effect of this Court's decision in *National Labor Relations Board v. Express Publishing Company* which decision has resulted in diverse interpretations by the Circuit Courts, causing a serious state of confusion ..... 17

POINT II—Under the principles of the *National Labor Relations Board v. Express Publishing Company* case, the mere violation of any subdivision of Sec. 8 of the Act did not justify an order enjoining Petitioners from violating all sections of the Act ..... 19

POINT III—The findings, conclusions and order of the Board are not supported by a substantial amount of evidence nor by proper evidence ... 24

POINT IV—The provisions in the order relating to back pay are improper ..... 27

Conclusion ..... 29

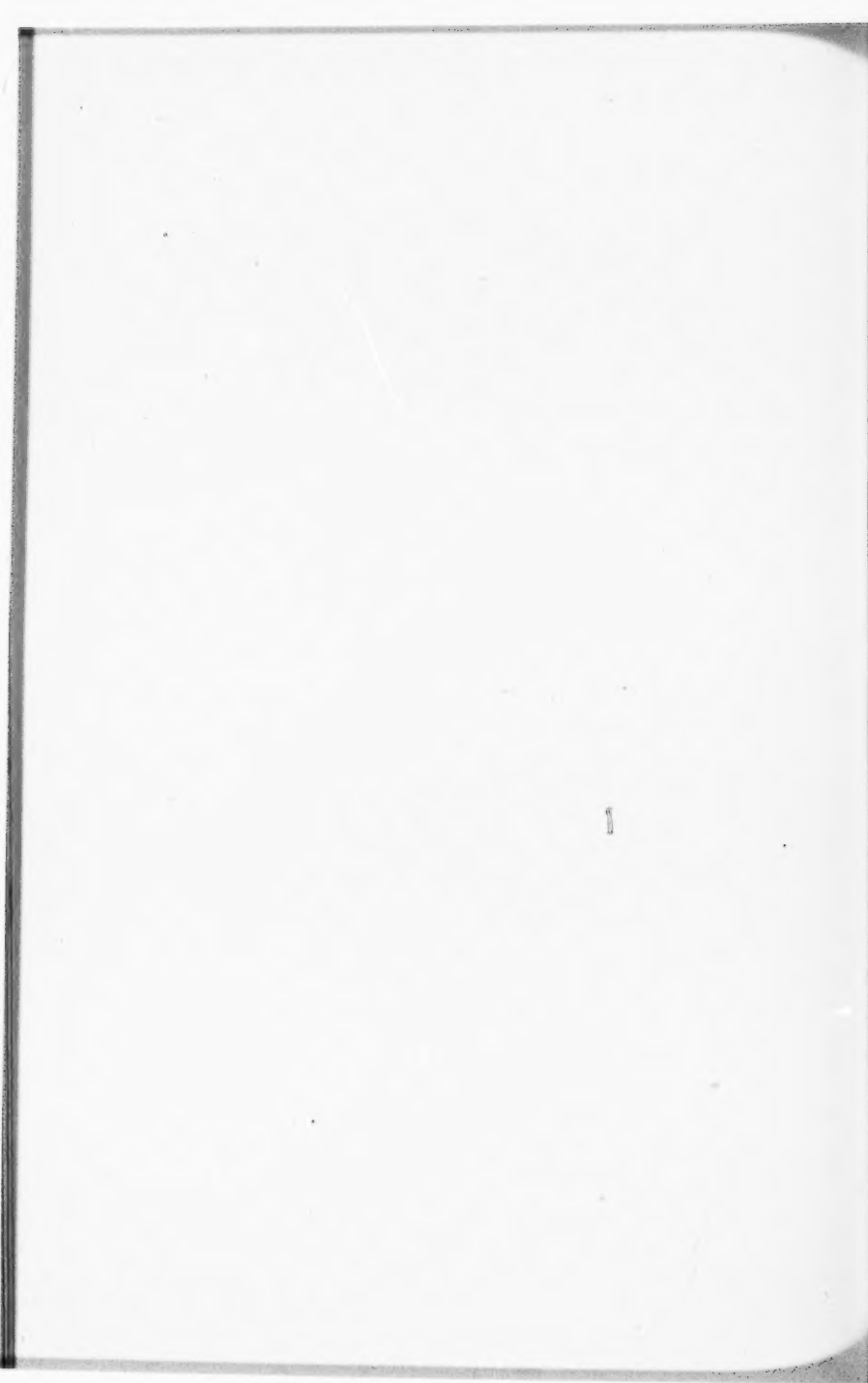
## AUTHORITIES CITED

	PAGE
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 .....	16, 24
H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 61 S. Ct. 320 .....	21
International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, 61 S. Ct. 83 .....	22
National Labor Relations Board v. Air Associates Inc., 121 F. 2d 586 (C. C. A. 2) .....	8, 18
National Labor Relations Board v. Burry Biscuit Corporation, 123 F. 2d 540 (C. C. A. 7) .....	8, 17
National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 S. Ct. 501 .....	24
National Labor Relations Board v. Continental Oil Co., 121 F. 2d 120 (C. C. A. 10) .....	8, 17
National Labor Relations Board v. Entwistle Mfg. Co., 120 F. 2d 532 (C. C. A. 4) .....	8, 18
National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 61 S. Ct. 693 .....	4, 7, 15, 16, 17, 19, 20, 29
National Labor Relations Board v. Federbush Co. Inc., 121 F. 2d 954 (C. C. A. 2) .....	9
National Labor Relations Board v. Grower-Shipper Vegetable Assn. of Central California et al., 122 F. 2d 368 (C. C. A. 9) .....	8, 17
National Labor Relations Board v. Kaplan Bros., 138 F. 2d 884 (C. C. A. 2) .....	1, 11
National Labor Relations Board v. Link Belt Company, 311 U. S. 584, 61 S. Ct. 358 .....	22
National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904 .....	10, 17, 28
National Labor Relations Board v. Moench Tanning Co. Inc., 121 F. 2d 951 (C. C. A. 2) .....	9

National Labor Relations Board v. Newark Morning Ledger, 120 F. 2d 262 (C. C. A. 3) Certiorari denied 314 U. S. 693, 62 S. Ct. 363 .....	8, 20
National Labor Relations Board v. Reed & Prince Mfg. Co., 118 F. 2d 874 (C. C. A. 1) Certiorari denied 313 U. S. 595, 61 S. Ct. 1119 .....	18
National Labor Relations Board v. Standard Oil Co., 138 F. 2d 885 (C. C. A. 2) .....	4, 11, 18
National Labor Relations Board v. Tex-O-Kan Flour Mills, 122 F. 2d 433 (C. C. A. 5) .....	8, 17
Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 61 S. Ct. 845 .....	28

## STATUTES AND RULES CITED

Section 240 (a) of the Judicial Code (28 U. S. C. A. § 347 (a)) .....	7
Section 10 (e) of the National Labor Relations Act (29 U. S. C. A. § 160 (e)) .....	7
General Rule 38, Section 5, Subdivision (b) of the Supreme Court of the United States .....	7
Section 7 of National Labor Relations Act (29 U. S. C. A. § 157) .....	14
Section 8 of National Labor Relations Act (29 U. S. C. A. § 158) .....	14
Section 10 (c) of National Labor Relations Act (29 U. S. C. A. § 160 (c)) .....	15



IN THE  
**Supreme Court of the United States**

FEBRUARY TERM, 1944

\_\_\_\_\_  
No.  
\_\_\_\_\_

MAX KAPLAN and JACOB KAPLAN, co-partners, doing business under the firm name and style of KAPLAN BROS.,

Petitioners,

—         —  
*against*

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Max Kaplan and Jacob Kaplan, co-partners, doing business under the firm name and style of Kaplan Bros., the petitioners herein, pray that a writ of certiorari issue to review the decree (R. 363-365) of the United States Circuit Court of Appeals for the Second Circuit, filed on November 17, 1943 (R. 365). Said decree granted the petition of the National Labor Relations Board to enforce its order in accordance with the Court's opinion, 138 F 2d 884, (R. 361-362).

A certified transcript of the record, including the proceedings in the Circuit Court of Appeals, has been filed and served in compliance with Rule 38 of this Court.

### Summary Statement of Matter Involved

*Re the Incidents Involved:* Petitioners have been manufacturing artificial flowers since 1900 (R. 302). They have approximately 500 female employees in the decorative flower department (R. 223). Lombardi is the forelady in charge of these employees (R. 223). Doran was an employee, one of many floorgirls whose duty it was to distribute and collect the work of a small group of girls (R. 63).

The Board claimed that in June, 1941, Lombardi asked Doran and DeFilippi, another floorgirl, to dissuade the other employees from joining a union, because if a union was successful Petitioner would close down (R. 54). Doran admitted that she never bothered to influence any employee (R. 54).

Doran testified that on April 27, 1942, Lombardi stated to DeFilippi that she (Lombardi) knew that Doran had attended a union meeting (R. 60). On May 6, 1942 Lombardi discharged Doran (R. 75). They had an argument about the manner in which Doran was doing her work and the way in which she spoke to Lombardi. The Board claimed the circumstances connected with the discharge indicated it was because of Doran's union affiliation (R. 69-75). Lombardi denied having ever made anti-union statements (R. 233) and petitioners claimed the circumstances showed that the discharge was because Doran was insubordinate, disrespectful and disobedient (R. 228, 231-232). In spite of said conduct, Lombardi was willing to reinstate her if she would apologize, not for her union membership, but because of her conduct and actions toward Lombardi personally (R. 232-233).

Throughout all the proceedings, Petitioners objected and contended that the Board's evidence was not the substantial evidence required by law, but was based entirely on hearsay and circumstantial testimony (R. 329-

332, 61-62, 126-130, 167, 274). Petitioner further insisted that even if no defense had been interposed and it was held that the Board's evidence was credible, the happening of the two sporadic incidents over a period of almost a year would not justify the cease and desist provisions of the Board's order (R. 352-354). This was emphasized because there is absolutely no evidence, direct or indirect, that Petitioners ever had knowledge of these two incidents, assuming them to have occurred. There is no evidence that Louise Doran or any one else ever called them to the attention of Petitioners. In fact Doran testified she "didn't bother," after Lombardi spoke to her in 1941 (T. 54). There is no evidence that Lombardi ever insisted upon compliance with her request. There is no evidence that Doran was ever questioned in regard to union affiliations at the time she was hired nor was any other girl ever so questioned. There is no evidence, except in regard to the incident involved herein that any girl was ever discharged because of union membership. There is no evidence that Petitioners ever discouraged union membership. Aside from the two isolated instances there was no evidence that any supervisory employee ever mentioned union activity to any employee. There is no evidence that Petitioners ever coerced or interfered with the employees' right to organize. There is no evidence that Petitioners refused to bargain collectively.

However the Board found that Petitioners violated Secs. 8 (3) and 8 (1) of the Act and ordered Petitioners to:

**"1. Cease and desist from:**

(a) Discouraging membership in Textile Workers Union of America, Greater New York Joint Board, C.I.O., or any other labor organization in regard to the hire or tenure of employment or any term or condition of employment of their employees;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (R. 352-353.)

The Court below held that in regard to the discharge of Doran there was substantial evidence and it was possible to find either way (R. 361). In regard to Petitioners' objection to the breadth of the order as being contrary to this Court's decision in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693, the Court referred to its decision in *National Labor Relations Board v. Standard Oil Co.*, 138 F. 2d 885, handed down at the same time as the decision herein.

In the *Standard Oil Co.* case Judge Learned Hand wrote:

"The next question concerns that part of the order—Article I (d)—which directs the respondents to 'cease and desist' from in 'any other manner' denying to their employees their rights secured under section seven. This the Board embodied in its order, in spite of the fact that the only 'unfair labor practice' of which it found the respondents guilty was that mentioned in § 8 (2): i.e., 'dominating' the 'Association.' That now seems to Judge Chase and me directly contrary to the ruling of the Supreme Court in *Labor Board v. Express Publishing Co.*, 312 U.S. 426, which, as we understand it, limited the injunction to those 'unfair labor practices' of which the employer has been found guilty. It would follow that to issue an injunction under § 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of § 8. The question first arose in this circuit in *F. W. Woolworth Co. v. Labor Board*, 121 Fed. (2) 658, 662 and very shortly thereafter in *Labor Board v. Air Associates*, 121 Fed. (2) 586, 592. Both concerned only violations of § 8 (3), yet in each case we sustained the broad clause. On the other hand less than two weeks

later in two decisions rendered almost simultaneously, we declared that, although the court as then constituted thought the clause improper we would yield to the authority of *Labor Board v. Air Associates*, supra. In the first of these two cases—*Labor Board v. Moench Tanning Co.*, 121 Fed. (2) 951, 954—the violations were of § 8 (2) and § 8 (5), and in the second—*Labor Board v. Federbush Company*, 121 Fed. (2) 954, 957—they were of § 8 (5) alone. Finally, in *Sperry Gyroscope Co. v. Labor Board*, 129 Fed. (2) 922, 931, we sustained the clause when the violations were of § 8 (2) and § 8 (3). We have thus so often interpreted *Labor Board v. Express Publishing Co.*, supra, in accord with the order before us, that it seems best to adhere to that interpretation until the Supreme Court passes upon the question again; especially as we infer from a number of cases that have recently come before us, that the Board uniformly incorporates the clause in its order. As the matter stands it can hardly serve to add to the confusion until some authoritative word shall be said.”

In a concurring opinion Judge Clark wrote:

“As indicated in the opinion I agree except that for my part I am satisfied we are correctly applying the *Express Publishing* ruling. That ruling was explicitly restricted to the situation there present of failure of negotiations leading to the employer’s refusal to bargain, contrary to § 8(5) of the Act, with a union in all other respects left undisturbed. But, as the Court says at page 434 of 312 U.S., this was ‘wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, ‘contrary to § 8 (2), or discrimination against union employees, contrary to § 8 (3). The Court thus neatly separated the issue before it from the two most burning issues in labor relations—those of ‘company unions’ or of discriminatory treatment of employees—where violations go to the very heart of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 4 Cir., 120 F. 2d 532, 536; *N.L.R.B. v. Air Associates*, 2

Cir., 121 F. 2d 586, 592; *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 118 F. 2d 874, 891, certiorari denied 319 U.S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549.

Hence I do not believe the Court intended drastically to limit the Board's discretion to determine the appropriate remedy to be applied in these two most important situations. In due course the Court may wish to define its ruling further; the justices were sharply divided the decisions provoked doubt among commentators,<sup>1</sup> and its effect has now to be sharply debated in most of the Board's cases coming before us. It appears to have been cited, with varying divergences, in some seventy-five cases in the little over two years since its rendition. But until we are told more, I am convinced our previous decisions should stand and do control here.

*Re Back Pay*: Paragraph 2 (b) of the Board's order provided that if Doran would not seek reinstatement she shall be paid from the date of her discharge to the date she received employment elsewhere (R. 353).

At the time of the hearing in July, 1942 Doran was employed elsewhere at a higher salary (R. 87). She was employed for a trial period which did not expire until August, 1942 (R. 91). She stated that she did not desire to be reinstated in her job with Petitioners if she could keep her new job (R. 90).

Petitioners contended that as long as Doran reserved the right to exercise an option as to whether or not she would return, her damage could only be determined as of the date she elected to return, or elected not to seek reinstatement.

The Court below held that the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere, and Petitioners were not entitled to a credit for any part of her wages during the probationary period (R. 362).

<sup>1</sup> 41 Col. L. Rev. 911, 29 Geo. L. J. 1026, 39 Mich. L. Rev. 1210, 27 Va. L. Rev. 956, 26 Wash. U. L. Q. 554; cf. 53 Harv. L. Rev. 472."

## Jurisdiction

The decree of the Circuit Court of Appeals was filed on November 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. sec. 347 (a)); and Sec. 10 (e) of the National Labor Relations Act (29 U.S.C.A. Sec. 160 (e)), and under General Rule 38 of this Court, Section 5, subdivision (b).

## Question Presented

1. Whether the decree (R. 363-365) containing the many cease and desist provisions was proper, particularly in view of the decision of this Court in *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 St. Ct. 693?
2. Whether the Board's Findings of Fact, Conclusions of Law and its Order, were based on substantial evidence?
3. Whether the award of back pay on the terms set forth in the decision of the Court below was proper?

## Reasons for Granting the Writ

1. The opinion and decree of the Court below, in upholding the order of the Board, is contrary to and in conflict with the decision of this Court in *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693.
2. Many of the Circuit Courts of Appeal have rendered conflicting opinions as to whether this Court by its decision in *National Labor Relations Board v. Express Publishing Company* intended the law set forth in said case to apply only to the specific facts of said case and only to violations of Section 8(5) of the Act, or to other violations of Section 8 of the Act.

Circuit Court decisions holding that the Express Publishing Company law is not limited to the specific facts of that case are: Third Circuit, *National Labor Relations Board v. Newark Morning Ledger*, 120 F. 2d 262; Fifth Circuit, *National Labor Relations Board v. Tex-O-Kan Flour Mills*, 122 F. 2d 433; Seventh Circuit, *National Labor Relations Board v. Burry Biscuit Corporation*, 123 F. 2d 540; Ninth Circuit, *National Labor Relations Board v. Grower-Shipper Vegetable Assn. of Central California et al.*, 122 F. 2d 368; Tenth Circuit, *National Labor Relations Board v. Continental Oil Co.*, 121 F. 2d 120.

Circuit Court decisions holding that the Express Publishing Company law is limited to a violation of only Section 8(5) of the Act are: Second Circuit, *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586; Fourth Circuit, *National Labor Relations Board v. Entwistle Mfg. Co.*, 120 F. 2d 532.

3. The Circuit Court of Appeals for the Second Circuit is itself sharply divided as to whether the Express Publishing case enunciated principles affecting violations of all the subdivisions of Section 8 of the Act or was made applicable only to a violation of subdivision 5 of said Section. The Court consisting of Judges Frank, Swan and Clark in a decision written by Judge Frank in *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586, strictly limited the principle of the Express Publishing case to the exact facts of said case. In subsequent decisions of the Circuit Court of Appeals for the Second Circuit when Judges L. Hand, Swan and Chase were on the bench, Judge L. Hand wrote as follows:

"The clause which incorporates verbatim et literatim, the contents of § 7 the Court, as now constituted, thinks contrary to *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed.—, but we have just held otherwise in a situation which so far as we can see is

indistinguishable for practical purposes, and we defer to the authority of our earlier decision *National Labor Relations Board v. Air Associates, Inc.*, 2 Cir., 121 F. 2d 586."

*National Labor Relations Board v. Moench Tanning Co. Inc.*, 121 F. 2d 951, 954.

Again in a subsequent decision Judge L. Hand wrote:

"A majority of the Court as now constituted regards that provision of the order which incorporates § 7 in its exact words as contrary to *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed.—but we yield to our recent decision in *National Labor Relations Board v. Air Associates, Inc.*, 2 Cir., 121 F. 2d 586."

*National Labor Relations Board v. Federbush Co. Inc.*, 121 F. 2d 954, 957.

Most recently in the *Standard Oil Co.* case, referred to in this very case the Court below again emphasized its division of opinion and restated its determination:

"to adhere to that interpretation until the Supreme Court passes upon the question again" (Petition, p. 5).

4. The question presented is of great public importance in the administration of the National Labor Relations Act, involving a vital question of Federal Law, which has been debated "with varying divergences in some seventy-five cases in the little over two years" (Petition, p. 6), since this Court rendered the *Express Publishing* decision.

5. The decree of the Court below in upholding the Findings of Fact and Conclusions of Law and Order of the Board defeats the basic law that the Board's Findings, Conclusions and Order must be supported by substantial evidence.

6. The opinion and decree of the Court below, in upholding the Board's method of computing back pay has adopted a new formula, which is in conflict with the decision of this Court in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348, 58 S. Ct. 904, 912.

WHEREFORE, your Petitioners referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that the Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed and that your Petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, New York, N. Y., February 8, 1944.

MAX KAPLAN AND JACOB KAPLAN,  
co-partners, doing business under  
the firm name and style of  
Kaplan Bros.,

Petitioners,

By HERBERT L. WASSERMAN,  
Attorney for Petitioners.





## BRIEF IN SUPPORT OF PETITION

---

### Opinions Below

The decision, findings of fact, conclusions of law and order of the National Labor Relations Board are reported in the Board's Decisions and Orders Vol. 45, pages 799-811 (R. 335-354). The opinion of the United States Circuit Court of Appeals for the Second Circuit, in which the order of the National Labor Relations Board was approved, is reported in 138 F. 2d 884 (R. 361-362). The opinion of said Court in *National Labor Relations Board v. Standard Oil Co. et al*, referred to in the Court's opinion in the *Kaplan* case, is reported in 138 F. 2d 884. The pertinent parts of said opinion are printed in the Petition herein, pages 4-6.

### Jurisdiction

Note Petition (*supra*, p. 7).

### Statement of the Case

This case came before the Court below on the petition of the Board under Sec. 10 (e) of the Act for enforcement of its order against Petitioners issued November 27, 1942 (R. 335-354). The order required Petitioners to "cease and desist" from violating practically every provision of the Act (R. 352-353). The Circuit Court, Second Circuit sustained the order (R. 361-362).

The order was based on the following evidence:

In June 1941, Lombardi, Petitioners forelady, is alleged to have asked Doran and De Filippi, another employee to dissuade other employees from joining a union on the

statement that if a union was successful Petitioners would close down (R. 54). Doran admitted that she never bothered to influence any of the employees (R. 54).

There is no evidence that Lombardi pressed the point or that any action was taken against Doran because she didn't bother. There was no evidence that Lombardi's statement was ever made known to Petitioners or was authorized by them.

On April 27, 1942, Lombardi is alleged to have stated to De Filippi, that Doran and De Filippi had attended a union meeting. De Filippi testified that Lombardi had only mentioned that she knew De Filippi was at the meeting (R. 14-15, 18) and that when she told Doran that Lombardi knew Doran was at the meeting, she based that statement on the assumption that Lombardi knew they were close friends (R. 29-30) and wherever De Filippi went, Doran also went (R. 25, 31-32).

The Trial Examiner realized that it was vital to prove that Lombardi actually knew that Doran attended the union meeting, otherwise the Board could not ascribe an illegal motive to Doran's discharge (R. 29). De Filippi, the Board's own witness (R. 45), and the only witness who spoke to Lombardi, denied that Lombardi ever said to her that she knew that Doran attended a union meeting (R. 14-15, 18).

On May 6, 1942, Doran was discharged by Lombardi (R. 75). The circumstances according to Doran were: Louise, another floorgirl, came to her and asked for work. Doran told her she had no time to give it to her. She told her to take it herself (R. 69). Louise said she would tell Lombardi (R. 69). Ten minutes later Lombardi called Doran over and discussed the incident (R. 69). Lombardi again spoke to Doran, accusing her of being fresh in the way she acted and stating it was Doran's duty to give Louise the work (R. 72-73). This led to angry words between them and Lombardi said she was fired (R. 74-75).

Lombardi testified that the incident started in the same way, but when she spoke to Doran about it, Doran in a loud tone of voice replied that she wanted Lombardi to understand that she had no time to give Louise any work (R. 228). Then Lombardi asked her "Isn't there any difference in the position between us" (R. 231); Doran replied, "no", and the words between them led to Doran's discharge (R. 232).

Before Lombardi went for Doran's pay she asked "Louise (Doran) \* \* \* are you sorry" (R. 232). She would have taken her back immediately if she had apologized (R. 232). Even at the time of the hearing she was ready to reinstate Doran if she apologized (R. 233). Nowhere did Doran or any witness for the Board rebut Lombardi's statement that she offered to reinstate Doran if she apologized.

There was no evidence that any of these facts were called to the attention of Petitioners. There was no evidence that Doran sought to appeal to Petitioners over Lombardi's Decision. There was no evidence that Petitioners authorized the above incidents. There was no evidence of an anti-union policy by Petitioners.

### **Specification of Errors**

Petitioners will urge, if the writ of certiorari is issued, that the Circuit Court of Appeals for the Second Circuit erred:

1. By holding that the "cease and desist" provisions of the Board's order were proper under the law.
2. By holding that the "cease and desist" provisions of the Board's order were proper on the facts.
3. By holding that there was substantial evidence in the record to support the material findings of facts, conclusions of law and order of the Board.

4. By holding that in the calculation of back pay to be awarded to the discharged employee, the employer was not entitled to a credit for the employee's earnings up to the date she elected to seek or not seek reinstatement.

### **Statute Involved**

The Statute involved is the National Labor Relations Act (29 U. S. C. A., sec. 151, et seq.). The pertinent provisions of the Act are:

Sec. 7 (Sec. 157 of 29 U. S. C. A.):

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

Section 8 (Sec. 158 of 29 U. S. C. A.):

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any

other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section 10c (Sec. 160(c) of 29 U. S. C. A.):

“\* \* \* If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person, an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. \* \* \*”

### Summary of Argument

Point 1: The petition presents a vital question of Federal Law, involving the administration of the National Labor Relations Act. This Court's decision in *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693 has resulted in divergent interpretations by the United States Circuit Courts. The Courts of the Second and Fourth Circuits have limited the principles of the *Express Publishing* case to violations of Sec. 8 (5) of the Act. The Judges of the Second Circuit are in continuous disagreement on this point. The Courts

of the Third, Fifth, Seventh, Ninth and Tenth Circuits hold that the law of the *Express Publishing* case is applicable to violations of the Act enumerated in the other subdivisions of Sec. 8. The confusion will continue until "some authoritative word shall be said" (Petition, p. 5) by this Court.

Point 2: In *National Labor Relations Board v. Express Publishing Company, supra*, this Court held that although a violation of Sec. 8 (5) of the Act might be a technical violation of Sec. 8 (1) and Sec. 7 of the Act, the Board was not justified in making a blanket order restraining the employer from committing any act in violation of the Statute, however unrelated it may be. The Board on the basis of the two isolated incidents herein, held that Petitioners violated Sec. 8 (3) and 8 (1) of the Act, and issued an order restraining the Petitioners from violating practically the entire Act (R. 352-353). The Petitioners contend that the principles of the *Express Publishing* case are applicable herein and the broad order of the Board was unjustified.

Point 3: This Court held in *Consolidated Edison Co. et al. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, that the findings of the Board must be supported by substantial evidence. Petitioners contend that an analysis of the record shows that the vital evidence is uncorroborated hearsay and that the total evidence is not adequate to support the conclusions of the Board.

Point 4: In regard to the award of back pay: at the time of the hearing Doran, the discharged employee, had a better paying position for a probationary period. She did not desire to return to Petitioners if she could keep her new job (R. 91). She was granted the right to elect to return as of the date when her probationary period expired (R. 350). She did not return. Petitioners contend that if she had returned, they would be entitled to deduct from their

liability, her earnings to the date she exercised her option, being the date she might have sought reinstatement. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904. The Court below held that her damage was to be measured as of the date she began to earn as much elsewhere.

## ARGUMENT

---

### POINT I

**The petition presents an important question of Federal law, involving the effect of this Court's decision in *National Labor Relations Board v. Express Publishing Company* which decision has resulted in diverse interpretations by the Circuit Courts, causing a serious state of confusion.**

*National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, was decided on March 3, 1941. Since that time the case has been sighted with varying divergences some seventy-five times (Judge Clark, Petition, p. 6).

Most of the United States Circuit Courts of Appeal have held that the principles of the *Express Publishing* case were applicable to violations of the Act in addition to Sec. 8 (5). Those Courts are: Fifth Circuit, *National Labor Relations Board v. Tex-O-Kan Flour Mills*, 122 F. 2d 433; Seventh Circuit, *National Labor Relations Board v. Burry Biscuit Corporation*, 123 F. 2d 540; Ninth Circuit, *National Labor Relations Board v. Grower-Shipper Vegetable Assn. of Central California et al.*, 122 F. 2d 368; Tenth Circuit, *National Labor Relations Board v. Continental Oil Co.*, 121 F. 2d 120.

Other United States Circuit Courts of Appeal have held that the law of the *Express Publishing* case is limited to a violation of only Sec. 8 (5) of the Act. Those Courts are:

Second Circuit, *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586; Fourth Circuit, *National Labor Relations Board v. Entwistle Mfg. Co.*, 120 F. 2d 532.

Judge Clark, in his concurring opinion (Petitioner, p. 6) in the case of *National Labor Relations Board v. Standard Oil Co.* sights the First Circuit as being in harmony with the decisions of the Second Circuit. He referred to the case of *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 1 Cir., 118 F. 2d 874, certiorari denied 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549. However, a study of that case indicates that said Court did not limit itself to the strict interpretation of the *Express Publishing* case which was adopted by the Second Circuit. The First Circuit held that it reached its decision on that part of the law of the *Express Publishing* case which held that a wider restraining order would be issued where there were persistent attempts by varying methods to interfere with the rights of self organization and where danger of the commission of other violations was to be anticipated by the employer's past conduct.

The United States Circuit Court of Appeals for the Second Circuit is itself sharply divided. Judges Learned Hand and Swan held "to issue an injunction under § 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of § 8". (Petition, p. 4). Notwithstanding their belief that the *Empire Publishing* decision was not limited to the facts of that case, they determined to adhere to the prior decision of other judges of the Second Circuit "until the Supreme Court passes upon the question again" (Petition, p. 5).

It is evident that judges of the Circuit Courts are soliciting a clarification of this point. Until this Court passes upon the specific points raised in the aforesaid decisions and by the Petition herein, the confusion will continue and the Board and all persons affected by the Act will be left in doubt as to their legal rights on this vital matter.

## POINT II

**Under the principles of the *National Labor Relations Board v. Express Publishing Company* case, the mere violation of any subdivision of Sec. 8 of the Act did not justify an order enjoining Petitioners from violating all sections of the Act.**

An analysis of *National Labor Relations Board v. Express Publishing Company*, 61 S. Ct. 693 indicates that it sets forth the following principles:

1. The Act does not give the Board an authority which Courts cannot rightly exercise, to enjoin all provisions of the statute merely because the violation of one has been found (*Express Publishing, supra*, p. 433).

2. It does not follow that, because the acts of Petitioners which the Board has found to be an unfair labor practice defined by Sec. 8 of the Act, are also a technical violation of Sec. 8 (1), the Board is justified in making a blanket restraining order (*Express Publishing, supra*, pp. 433, 435).

3. The order restraining the violation of additional provisions of the Act can cover only those provisions which are related to those charged and found (*Express Publishing, supra*, p. 435). The tests for determining whether the acts are related are:

A. They must be persuasively related to the proven unlawful conduct (*Express Publishing, supra*, p. 433).

B. They must be so similar or related that the commission of one necessarily or rightly admits restraining all (*Express Publishing, supra*, p. 435).

C. They must give indication that in the future Petitioners would engage in all or any of the numerous other

unfair labor practices defined by the Act (*Express Publishing, supra*, pp. 436-437).

D. They must bear some resemblance to that which Petitioners have committed or that danger of their commission in the future is to be anticipated from the course of their conduct in the past (*Express Publishing, supra*, pp. 435-436).

4. The record must disclose persistent attempts by varying methods to interfere with the right of self organization (*Express Publishing, supra*, pp. 437-438).

It is respectfully submitted that the same law and the same tests should apply to the facts in this case.

The case which seems closest in fact is *National Labor Relations Board v. Newark Morning Ledger Co.*, 120 F. 2d 262, in which certiorari was denied, 62 S. Ct. 363, 314 U. S. 693. In that case one employee, Miss Fahy, who was President of Newark Newspaper Guild was discharged. The employer gave as the reason a program of economy and efficiency. The Board claimed it was the result of her union membership and activity. The Circuit Court accepted the Board's finding of fact. The Court decided:

“\* \* \* Upon the sole basis of the finding of an isolated act involving the discharge of a single employee the Board has entered a blanket order restraining the Ledger Company from hereafter committing any act in violation of the statute however unrelated it may be to the one act found to have been previously committed. The Company is thus, for example, enjoined, under pain of punishment for contempt, from dominating or contributing support to a labor organization in violation of Section 8 (2) altho there is no evidence that it has ever heretofore done so: \* \* \*.”

The Court held that the blanket restraining order was not justified and certiorari was denied by this Court.

Likewise in the instant case one employee was discharged. It may be argued that the conversation of Lombardi with Doran in June 1941 (Petition, p. 2; Brief, pp. 11-12) added a cumulative element. It must be remembered that Doran did not bother to influence any employees (R. 54). Applying the various tests, enumerated above in the Express Publishing case, there is absolutely no evidence in the record to prove or even to indicate that Petitioners had an anti union policy, that they authorized or permitted Lombardi to enforce such policy or that they did anything directly or indirectly to violate or cause the violation of any provision of the Act.

In determining the intent of the Petitioners and whether from their past conduct future violations of the Act are to be anticipated, consideration should be given to the fact that the two incidents are spaced in a period of almost a year apart and involve the same forelady and employee although there were approximately five hundred employees in that one department (R. 223).

The mere fact that Lombardi may have on two occasions made statements to Doran alone cannot indicate an intent or plan on the part of Petitioners to violate the Act. This is particularly true when there is no evidence to show that Petitioners ever orally or in writing stated or indicated their disapproval of the Act. This point is strengthened because there is no evidence to show that Doran, the union or anyone else ever complained to the Petitioners, or called their attention to Lombardi's statements, so that Petitioners could have had the opportunity to disaffirm and counteract such statements.

There are cases where employers have been held responsible for the acts of their supervisors. But a reading of those cases clearly shows that they differ in every respect from the instant one. In *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 61 S. Ct. 320, many

of the supervisors spoke to large groups of employees threatening reprisals for union support. The employer was advised of the activities of his employees but took no steps to notify the employees that such activities were unauthorized, or to correct the impression of the employees that support of the union was not favored by the employer. Surely under circumstances like that there can be no doubt as to the future conduct of the employer which is to be anticipated from its past practices.

Likewise in the cases of *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 61 S. Ct. 83 and *National Labor Relations Board v. Link Belt Company*, 311 U. S. 584, 61 S. Ct. 358, there were flagrant courses of conduct by the employer which created forces at work in the plant, making tenable the Board's Conclusions that the employer had intruded and effectively restrained the employees' rights guaranteed by the Act.

But the test of employer's guilt requires a greater amount of evidence and stronger testimony than was adduced herein. The test is:

"If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice, and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere (*Link Belt Co. supra*, 311 U. S. 584, 599)".

Surely under the facts in the instant case there was absolutely no evidence to prove that in the two incidents involved any employee was improperly restrained or that the Petitioners may fairly be charged with the responsibility for their occurrence.

Not only is there an absence of evidence to show union antagonism by Petitioners (R. 235), but Lombardi herself was willing to reinstate Doran in spite of the Board's

claim that Doran's discharge was motivated by her union membership. If Doran had apologized to Lombardi personally at the time she was discharged she would have been reinstated by Lombardi (R. 232). Even at the time of the hearing Lombardi was ready to reinstate Doran if she apologized for her conduct which Lombardi deemed detrimental to proper discipline and respect (R. 233).

Notwithstanding all of the above, if it is held that Doran was discharged illegally in violation of Section 8 (3) of the Act, under the principles of the Express Publishing Company there is no legal justification for the order which among other things requires Petitioners to:

"1. Cease and desist from:

\* \* \* \* \*

(b) "In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act (R. 352-353)".

The record is bare of any evidence to indicate that from Petitioners' past conduct there is danger that Petitioners will "in any other manner" interfere with or coerce their employees in the right to self organization, to form labor organizations to bargain collectively, etc. There is nothing in the record to show that Petitioners' past conduct bears resemblance to or is related to the rights guaranteed by the other subdivisions of Section 8 of the Act.

### POINT III

**The findings, conclusions and order of the Board are not supported by a substantial amount of evidence nor by proper evidence.**

The above arguments were made on the assumption that the facts as found by the Board were supported by legal evidence. It is submitted that there was no substantial evidence to justify the findings of the Board.

This Court defined substantial evidence in *Consolidated Edison Company et al. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206:

“\* \* \* Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

\* \* \* The statute provides that the rules of evidence prevailing in Courts of law and equity shall not be controlling. \* \* \* But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence” (see also *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 59 S. Ct. 501, 505).

In regard to the incident of June, 1941 wherein Lombardi is alleged to have spoken to Doran and De Filippi to dissuade other employees from joining a union, it cannot be seriously contended that there was a violation of the Act by Petitioners. Aside from the fact that Lombardi denied ever having made any anti-union statements (R. 233), Doran admitted that she did not bother to do anything about it (R. 54). Both Doran and De Filippi were so little affected by the request that they subse-

quently signed up with a union (R. 47). And most important there is absolutely no evidence that Petitioners authorized the statement or had any anti-union policy. There is no evidence that any one ever called it to their attention so that they could publicly repudiate it.

In regard to the discharge of Doran in the following year, the Board realized that it was necessary to prove that Lombardi actually knew that Doran was a member of a union in order to ascribe an illegal motive for her discharge. The Trial Examiner himself emphasized this point when he said:

“\* \* \* One of the issues in this case is whether the respondent knew whether or not Louise Doran was a member of the union. That is a part of the Board’s affirmative case. I assume, that Mr. O’Gorman is questioning this witness for the purpose of establishing that fact. I do not know what other proof he has or what other witnesses to call. That is his burden, the main part of the burden. I will let him support it” (R. 29).

This is how the Board tried to prove the “main part” of its burden. It called De Filippi as its own and first witness (R. 45). She was a close friend of Doran (R. 59). She was instrumental in inducing Doran to become interested in a union (R. 54-55). In the course of conversation Lombardi told her that she had heard that she was at a union. There was no other conversation between Lombardi and her in regard to unions (R. 14). De Filippi specifically and definitely denied that at the said time or any other time did Lombardi say that she knew that Doran was also at a union meeting (R. 14-15, 18). She admitted that she had told Doran that Lombardi knew that Doran was at a meeting. She said that she made that statement because Lombardi knew wherever she went both she and Doran went together (R. 25).

It was an inference on De Filippi's part, not based on anything Lombardi had said to her (R. 31-32).

The substantial part of the Board's case was built on that inference. Doran's evidence was based on what De Filippi told her (R. 83). Corroborating testimony was a mere repetition of the same inference (R. 126-130). No one testified on direct knowledge as to what Lombardi said, excepting De Filippi, and she denied that Lombardi ever said anything about Doran's union activities.

This is definitely a case where a witness creates an inference which is contrary to the facts, and repeats it to others. The Board then takes this testimony which when repeated is hearsay, and claims that the accumulated hearsay is binding although the party who invented the inference admits there was no factual justification for it. It is submitted that such evidence is not the kind of evidence this Court refers to when it speaks of substantial evidence.

It cannot be claimed that the conflicting testimony of Doran and Lombardi as to the circumstances connected with Doran's discharge was corroborating evidence sufficient to substantiate the hearsay evidence based on an inference. It is not corroborating evidence because in the absence of proof of knowledge by Lombardi as to Doran's union activity, the circumstances connected with Doran's discharge show that she was either discharged for good cause or at the whim of Lombardi. If Lombardi was not impelled to discharge Doran for the purpose of defeating the Act she was legally permitted to discharge her for any reason whatsoever. It not having been proved that Lombardi had knowledge of Doran's activities the Board has failed to prove its case by substantial evidence.

Equally important is the fact that even if the Board had proved the above matters by proper evidence it would still not be binding on Petitioners. (See discussion on parallel argument, Brief, pp. 21-22). There was absolutely

no evidence direct or indirect, that Petitioners had knowledge of the situation, that they authorized it, that it was called to their attention or that they were given an opportunity to publicly disclaim or condemn Lombardi's conduct.

Finally Lombardi herself evidenced her indifference to Doran's union activities by offering to reinstate her upon her apology at the time she was discharged (R. 232), and also at the time of the hearing (R. 233), and lastly when she promoted to Doran's position, Eleanor, Doran's intended sister-in-law (R. 137), who was also a member of the union (R. 82).

#### POINT IV

**The provisions in the order relating to back pay are improper.**

Petitioners object to paragraph 2(b) of the order (R. 353), which provides that if Doran does not seek reinstatement she shall be paid from the date of discharge to the date she received employment elsewhere. Petitioners contend that the formula should parallel paragraph 2(a), and should cover the period from discharge to reinstatement (R. 353) or the offer of reinstatement or the date when Doran had the right to exercise her option to be reinstated.

Doran was employed elsewhere and at a higher salary at the time of the hearing of July, 1942 (R. 87). She was employed for a trial period which did not expire until August, 1942 (R. 91). Only if she did not keep her new job did she desire to return to Petitioners (R. 90).

The Court below held that when she finally elected not to be reinstated, the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere (R. 362).

This Court held in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904:

“the order is criticized as arbitrary in that it is said to award back pay to date of reinstatement with deduction only for what was earned to the date of the order. We do not so read it, and the Board admits that credit must be given for all sums earned to date of reinstatement, and so construes the order.”

On this basis computations are made as of the date of reinstatement. Doran was given the right to be reinstated on a date subsequent to that of the order. Her damages are measured as of that date. The fact that she elected not to be reinstated does in no way affect the calculation of the amount of damage she suffered.

In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, this Court held that workers are to be made whole for “only actual losses”. Surely neither Doran nor anyone else could calculate what damages she suffered because of her discharge, at the time of the hearing or on the date of the order. Only in August, 1942 when she apparently made up her mind not to return to Petitioners could she know what her damages really were.

In any event under the decision of this Court in *Phelps Dodge Corp. v. National Labor Relations Board*, *supra*, the Board's order was defective, because even if it was allowed a wide discretion to determine procedural devices, it should at least have taken proof of Doran's damage on its own formula. The amount payable to Doran “should not have been left for possible final settlement in contempt proceedings” (*Phelps Dodge Corp.*, *supra*, 61 S. Ct. 845, 854).

### Conclusion

It is submitted that the Petition for a writ of certiorari should be granted in order that this Court may settle the effect and application of the principles enunciated in its decision in *National Labor Relations Board v. Express Publishing Company* so that the diversity of opinion among the various Circuit Courts may be eliminated; and with the clarification of the law the rights of the Petitioners herein be established.

Respectfully submitted,

HERBERT L. WASSERMAN,  
Attorney for Petitioners.

Dated, New York, N. Y., February 8, 1944.



①

②

U.S. - Supreme Court, U.S.  
FILED  
MAR 6 1944  
U.S. DEPT. OF JUSTICE

No. 680

In the Supreme Court of the United States

October Term, 1943

MAX KAPLAN, PETITIONER,

NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF HABEAS CORPUS  
STATE OF NEW YORK, COMPLAINANT,  
VERSUS  
CIRCUIT

TRUCK FOR THE STATE OF NEW YORK



# INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	16
Appendix.....	17

## CITATIONS

### Cases:

<i>American Enka Corp. v. National Labor Relations Board</i> , 119 F. (2d) 60 (C. C. A. 4).....	10
<i>Bethlehem Steel Co. v. National Labor Relations Board</i> , 120 F. (2d) 641 (App. D. C.).....	11
<i>Butler Bros. v. National Labor Relations Board</i> , 134 F. (2d) 981 (C. C. A. 7), cert. den., No. 274, this Term.....	9
<i>Jacksonville Paper Co. v. National Labor Relations Board</i> , 137 F. (2d) 148, cert. den., No. 342, this Term.....	10
<i>National Labor Relations Board v. Air Associates, Inc.</i> , 121 F. (2d) 586 (C. C. A. 2).....	10, 12, 14
<i>National Labor Relations Board v. Algoma Net Co.</i> , 124 F. (2d) 730 (C. C. A. 7), cert. den., 316 U. S. 706.....	9
<i>National Labor Relations Board v. American Laundry Ma- chinery Co.</i> , 138 F. (2d) 889 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Automotive Maintenance Machinery Co.</i> , 315 U. S. 282.....	9
<i>National Labor Relations Board v. Burke Machine Tool Co.</i> , 133 F. (2d) 618 (C. C. A. 6).....	11
<i>National Labor Relations Board v. Burry Biscuit Corp.</i> , 123 F. (2d) 540 (C. C. A. 7).....	12
<i>National Labor Relations Board v. Cassoff</i> , decided December 20, 1943 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Continental Oil Co.</i> , 121 F. (2d) 120 (C. C. A. 10).....	12
<i>National Labor Relations Board v. Electric Vacuum Cleaner Co.</i> , 315 U. S. 685.....	9
<i>National Labor Relations Board v. Elvine Knitting Mills</i> , 138 F. (2d) 633 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Entwistle Mfg. Co.</i> , 120 F. (2d) 532 (C. A. A. 4).....	10

## Cases—Continued.

	Page
<i>National Labor Relations Board v. Express Publishing Co.</i> , 312 U. S. 426.....	7, 9, 11, 13, 14
<i>National Labor Relations Board v. Federbush Co.</i> , 121 F. (2d) 954 (C. C. A. 2).....	14
<i>National Labor Relations Board v. Fitzpatrick &amp; Weller, Inc.</i> , 138 F. (2d) 697 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Germain Seed &amp; Plant Co.</i> , 134 F. (2d) 94 (C. C. A. 9).....	11
<i>National Labor Relations Board v. Grower-Shipper Vege- table Ass'n</i> , 122 F. (2d) 368 (C. C. A. 9).....	12
<i>National Labor Relations Board v. Hollywood-Mazwell Co.</i> , 126 F. (2d) 815 (C. C. A. 9).....	11
<i>National Labor Relations Board v. Jasper Chair Co.</i> , 138 F. (2d) 756 (C. C. A. 7), certiorari denied, No. 615, this Term.....	11
<i>National Labor Relations Board v. Metal Mouldings Corp.</i> , decided April 6, 1943 (C. C. A. 6).....	11
<i>National Labor Relations Board v. Moench Tanning Co., Inc.</i> , 121 F. (2d) 951 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Montag Brothers, Inc.</i> , decided February 3, 1944 (C. C. A. 5).....	10
<i>National Labor Relations Board v. Nevada Consolidated Copper Corp.</i> , 316 U. S. 105.....	9, 13
<i>National Labor Relations Board v. Newark Morning Ledger Co.</i> , 120 F. (2d) 262 (C. C. A. 3), cert. den., 314 U. S. 693.....	12
<i>National Labor Relations Board v. Reed &amp; Prince Mfg. Co.</i> , 118 F. (2d) 874 (C. C. A. 1), cert. den., 313 U. S. 595.....	10
<i>National Labor Relations Board v. Regal Knitwear Com- pany</i> , decided February 15, 1944 (C. C. A. 2).....	13
<i>National Labor Relations Board v. A. Sartorius &amp; Co., Inc.</i> , decided January 31, 1944 (C. C. A. 2).....	13
<i>National Labor Relations Board v. Standard Oil Co.</i> , 138 F. (2d) 885 (C. C. A. 2).....	12, 13, 14
<i>National Labor Relations Board v. Sunbeam Electric Mfg. Co.</i> , 133 F. (2d) 856 (C. C. A. 7).....	11
<i>National Labor Relations Board v. Tex-O-Kan Flour Mills Co.</i> , 122 F. (2d) 433 (C. C. A. 5).....	12
<i>National Labor Relations Board v. Times-Picayune Publish- ing Co.</i> , 130 F. (2d) 257 (C. C. A. 5).....	11
<i>National Labor Relations Board v. Van Deusen</i> , 138 F. (2d) 893 (C. C. A. 2).....	10, 13
<i>National Labor Relations Board v. Weirton Steel Co.</i> , 135 F. (2d) 494 (C. C. A. 3).....	10
<i>Onan v. National Labor Relations Board</i> , decided January 6, 1944 (C. C. A. 8).....	11
<i>Owens-Illinois Glass Co. v. National Labor Relations Board</i> , 123 F. (2d) 670 (C. C. A. 6), cert. den., 316 U. S. 662....	6

### III

#### Cases—Continued.

#### Page

<i>Rapid Roller Co. v. National Labor Relations Board</i> , 126 F. (2d) 452 (C. C. A. 7), cert. den., 317 U. S. 650-----	11
<i>Roebeling Employees Assn. v. National Labor Relations Board</i> , 120 F. (2d) 289 (C. C. A. 3)-----	10
<i>Wilson &amp; Co. v. National Labor Relations Board</i> , 126 F. (2d) 114 (C. C. A. 7), cert. den., 316 U. S. 699-----	9, 14

#### Statute:

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V, Secs. 151 et seq.):	
Sec. 7-----	17
Sec. 8 (1)-----	17
Sec. 8 (3)-----	17
Sec. 10 (a)-----	17
Sec. 10 (c)-----	18



# In the Supreme Court of the United States

OCTOBER TERM, 1943

---

No. 690

MAX KAPLAN BROS., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN  
OPPOSITION

---

## OPINIONS BELOW

The opinion of the court below (R. 361-362) is reported in 138 F. (2d) 884. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 335-354) are reported in 45 N. L. R. B. 799.

## JURISDICTION

The decree of the court below (R. 363-365) was entered on November 17, 1943. The petition for a writ of certiorari was filed February 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925, and under Section 10 (e) of the National Labor Relations Act.

#### QUESTIONS PRESENTED

1. Whether there is substantial evidence to support findings of the Board, which were sustained by the court below, that petitioner by various antiunion statements, and by the discriminatory discharge of one employee, engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

2. Whether the cease and desist provisions of the Board's order, which were sustained by the court below, are proper in view of the Board's findings.

3. Whether the back-pay provisions of the Board's order are proper.

#### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix *infra*, pp. 17-18.

#### STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 335-354). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:<sup>1</sup>

---

<sup>1</sup> In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

In June 1941, within a day or two of the initiation of an attempt by the International Ladies' Garment Workers Union to organize petitioner's employees, Forelady Lombardi, general supervisor over petitioner's 500 women employees, instructed Norma de Filippi and Louise Doran, employees working under her supervision, to dissuade other employees from joining the organization, warning that if a union gained a foothold in petitioner's plant, petitioner would cease operations (R. 339-340; 52-54). Both Doran and de Fillipi were so-called "floor girls." They each distributed material and collected the work of a group of approximately 30 girls who worked together at a large table (R. 340; 11, 52).

In April 1942, another labor organization, the Textile Workers Union of America, herein called the Union, began an organizational campaign at petitioner's plant (R. 340; 54). On the evening of April 24, de Fillipi and Doran attended a union meeting at the request of the girls in their respective groups (R. 341; 54-55, 57). On the following morning, Forelady Lombardi told de Filippi that she knew the two girls had attended the meeting and warned her that if Max Kaplan, one of petitioner's partners, found out that they were union members, they would be discharged (R. 341; 59-61, 303-304).

On April 27, Doran openly and actively solicited union members and distributed union ap-

plication cards among petitioner's employees (R. 343; 100-105, 84-85). Doran was at this time in charge of a table of 28 girls located next to de Filippi's table at one end of the plant, at a considerable distance from Lombardi's desk (R. 343; 63). On May 5, Lombardi abruptly moved Doran's table to a place only one table removed from her own desk, and next to the station of the senior floor girl (R. 343; 66-67, 123). Such a move was not customary in the plant, and two witnesses testified that they heard Lombardi, at the time it was made, say to the senior floor girl in reference to Doran and her group, "I have them up here and keep an eye on them" (R. 343-344; 67-69, 123, 142-143).

On the following morning, May 6, a floor girl named Rubino, whose group performed the next operation on material finished by Doran's girls, went over to Doran's table and requested material. Doran told Rubino that she was busy at that moment and suggested that Rubino take the material which she needed, as she had often done in the past, from the table where such work was customarily kept. Rubino, however, instead of doing this, complained to Lombardi that Doran had refused to give her material. Lombardi, without inquiring into the situation or herself directing Rubino to take the needed material, her customary practice under such circumstances, summoned Doran to her desk and before Doran

had reached it, loudly upbraided her for telling Rubino she had no time to supply Rubino with material. (R. 344-347; 72-80, 124, 194-196.) Shortly thereafter, she approached Doran at her work table, and after charging her with being "very fresh," and refusing to accept Doran's repeated explanation that she had been busy collecting work at the time of Rubino's request, revealed the real basis for her anger by exclaiming, "Do you think you are smart? Don't you think I know you and Rubino stabbed me behind my back?" (R. 346; 72-73). Doran replied that it was Lombardi who "did the stabbing"; that Lombardi had been watching her ever since she attended "something" *i. e.*, the union meeting (R. 346-347; 74). To this Lombardi retorted, "The trouble with you is that you think you have somebody back of you \* \* \* I am not scared of you or anyone else that is in back of you." Doran protested that she had nobody "in back of" her. Lombardi replied, "You are fired \* \* \* I have gotten rid of you and the next one I will get rid of is Norma and everybody connected with this" (R. 347; 74-75).

The Board found that Lombardi's remarks and warnings concerning the International Ladies' Garment Workers Union in June 1941 constituted interference, restraint and coercion in violation of Section 8 (1) of the Act (R. 340). The Board found further that the discharge of Doran

constituted a violation of Section 8 (1) and (3) of the Act (R. 349, 352).

Upon the foregoing findings, the Board ordered that petitioner (1) cease and desist from discouraging membership in the Union or any other labor organization of its employees by discrimination in regard to the hire or tenure of employment or any term or condition of employment of its employees; (2) cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act; (3) reinstate Doran to her former or to a substantially equivalent position, in case Doran makes application for reinstatement within 5 days after the date of issuance of the Board's order; and (4) award Doran back pay, in case she so applies for reinstatement, from the date of her discharge to the date of her reinstatement, or if she does not so apply for reinstatement, from the date of her discharge to the date she obtained the employment she held at the time of the hearing (R. 352-353).

On February 15, 1943, the Board filed in the court below a petition to enforce the Board's order. On November 17, 1943, the court entered a decree enforcing the Board's order in full (R. 363-365).

#### ARGUMENT

1. The issue of the substantiality of the evidence supporting the Board's findings (Pet. 2-4,

7, 9, 13, 16, 24-27) presents no question of general importance. Furthermore, the detailed facts found by the Board and summarized in the Statement, *supra*, pp. 2-5, amply support its ultimate findings, as the court below held (R. 361). None of these findings rests upon hearsay evidence, as erroneously contended by petitioner (Pet. 16); they are grounded upon direct evidence of petitioner's hostility to the Union expressed through its supervisory employee, Frances Lombardi, in June 1941, and on May 5 and 6, 1942. The hearsay testimony concerning Lombardi's knowledge of Doran's participation in the union meeting of April 24, 1942, referred to by petitioner, merely corroborates and strengthens the conclusion, reasonably drawn from the direct evidence, that petitioner was well aware of the identity of the leaders of the union activity in the plant. It is to be noted that this hearsay testimony, while credited by the Board, is used only in the section of the Board's findings entitled "Background" (R. 339-342).

2. Petitioner contends (Pet. 7-9, 13, 15-16, 19-23) that the provision of the order which restrains it from in any manner infringing the rights guaranteed to employees under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426. But in the *Express Publishing* case the Court laid down

the rule that "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. \* \* \* The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (312 U. S. at 436-437). The Court's refusal in that case to uphold a broad cease and desist order, similar to the contested order in the instant case, was predicated upon the peculiar facts of that case; there, as the Court pointed out, the unfair labor practice was confined exclusively to a refusal to negotiate with the Union, a violation of Section 8 (5) of the Act. And while the Court recognized that a violation of Section 8 (5) also technically constituted a violation of Section 8 (1), it distinguished such a violation from the case where the Board found unfair practices which constituted separate and independent violations of Section 8 (1), or which threatened to continue or be followed by similar practices in the future. The instant case presents unfair labor practices of the latter type. The threats and antiunion actions of petitioner's supervisor, wholly unrestrained by petitioner's higher officials, constituted

independent violations of Section 8 (1) of the Act; and there is, moreover, ample basis in the record for the belief that other similar violations would occur in the future unless restrained. The form of order enforced below was therefore wholly proper under the rule enunciated in the *Express Publishing* case. Subsequent to its decision in that case this Court has enforced provisions identical to the one here in controversy. *National Labor Relations Board v. Automotive Maintenance Machinery Co.*, 315 U. S. 282; *National Labor Relations Board v. Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioner were presented to this Court by the employers in *Owens-Illinois Glass Co. v. National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co. v. National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board v. Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706; and *Butler Bros. v. National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, No. 274, this Term.

Despite petitioner's assertions (Pet 7-9, 15-16, 17-23), there is no conflict between the various circuit courts of appeals as to the propriety

of enforcing provisions identical with the one here in question where, as in the instant case, the record discloses an independent violation of Section 8 (1) of the Act. In such cases, the provisions are consistently enforced. *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 891 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board v. Air Associates*, 121 F. (2d) 586, 592 (C. C. A. 2); *National Labor Relations Board v. Van Deusen*, 138 F. (2d) 893, 895 (C. C. A. 2); *Roebbling Employees Assn. v. National Labor Relations Board*, 120 F. (2d) 289, 296 (C. C. A. 3); *National Labor Relations Board v. Weirton Steel Co.*, 135 F. (2d) 494, 495-496 (C. C. A. 3); *American Enka Corp. v. National Labor Relations Board*, 119 F. (2d) 60, 63 (C. C. A. 4); *National Labor Relations Board v. Entwistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4). While there are early decisions in the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, and in the Court of Appeals for the District of Columbia, deleting or modifying the broad cease and desist order despite the presence of an independent violation of Section 8 (1), more recent decisions in subsequent cases in each of these circuits have enforced such orders. *Jacksonville Paper Co. v. National Labor Relations Board*, 137 F. (2d) 148 (C. C. A. 5), certiorari denied, No. 342, this Term; *National Labor Relations Board v. Montag Brothers, Inc.*,

decided February 3, 1944 (C. C. A. 5); *National Labor Relations Board v. Times-Picayune Publishing Co.*, 130 F. (2d) 257, 259 (C. C. A. 5); *National Labor Relations Board v. Burke Machine Tool Co.*, 133 F. (2d) 618 (C. C. A. 6); *National Labor Relations Board v. Metal Mouldings Corp.*, decided April 6, 1943 (C. C. A. 6); *National Labor Relations Board v. Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 861-862 (C. C. A. 7); *Rapid Roller Co. v. National Labor Relations Board*, 126 F. (2d) 452, 461 (C. C. A. 7), certiorari denied, 317 U. S. 650; *National Labor Relations Board v. Jasper Chair Co.*, 138 F. (2d) 756 (C. C. A. 7), certiorari denied, No. 615, this Term; *David Onan v. National Labor Relations Board*, decided January 6, 1944 (C. C. A. 8); *National Labor Relations Board v. Hollywood-Maxwell Co.*, 126 F. (2d) 815, 819 (C. C. A. 9); *National Labor Relations Board v. Germain Seed & Plant Co.*, 134 F. (2d) 94, 99 (C. C. A. 9); *Bethlehem Steel Co. v. National Labor Relations Board*, 120 F. (2d) 641, 647 (App. D. C.).<sup>2</sup>

<sup>2</sup> The circuit courts of appeals are in disagreement as to the propriety of broad cease and desist provisions in cases in which, as in the *Express Publishing* case, there occur only technical violations of Section 8 (1) of the Act, *i. e.*, where there are violations of Section 8 (2), (3), or (4) singly or in combination, but in which there is no separate violation of Section 8 (1). This question is not in issue in the instant proceeding. The cases cited by petitioner in which other circuit courts of appeals limited the scope of such an order (Pet. 8) are, with a single exception, cases of mere technical violations of Section 8 (1), and hence are not in point

Nor is petitioner correct in asserting (Pet. 8-9, 18) that the Circuit Court of Appeals for the Second Circuit is divided concerning the propriety of the broad cease and desist orders in cases such as this, containing independent violations of Section 8 (1). In sustaining the broad order in *National Labor Relations Board v. Air Associates, Inc.*, 121 F. (2d) 586, that court expressly noted the independent violation of Section 8 (1) in that case. In its recent decision in *National Labor Relations Board v. Standard Oil Co.*, 138 F. (2d) 885, that court, in discussing the doubt of two of its six members, Judges Learned Hand and Chase, concerning the propriety of the broad order, squarely based such doubt on the absence of an independent violation of Section 8 (1) in that case, expressing the opinion (p. 888) that "to issue an injunction under Section 8 (1) the employer

---

here. Thus *National Labor Relations Board v. Newark Morning Ledger Co.*, 120 F. (2d) 262 (C. C. A. 3), contains independent violations only of Section 8 (3); *National Labor Relations Board v. Burry Biscuit Corporation*, 123 F. (2d) 540 (C. C. A. 7), of only Section 8 (2); *National Labor Relations Board v. Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9), of only, in the opinion of the court, Section 8 (5); *National Labor Relations Board v. Continental Oil Co.*, 121 F. (2d) 120 (C. C. A. 10), of only Section 8 (2). While there are independent violations of Section 8 (1) in *National Labor Relations Board v. Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433 (C. C. A. 5), it is to be noted that this case was decided in 1941. Since that date the Fifth Circuit Court of Appeals has consistently enforced the broad cease and desist provisions in cases of its type (see *supra*, pp. 10-11).

must have done something not specifically mentioned in other subdivisions of Section 8." The instant case does, of course, contain such an independent violation of Section 8 (1). In cases decided at the same time as or since the *Standard Oil* case, including the instant case, that court has upheld the broad provisions of the order, with or without reference to its discussion of this point in the *Standard Oil* case. *National Labor Relations Board v. American Laundry Machine Co.*, 138 F. (2d) 889; *National Labor Relations Board v. Elvine Knitting Mills*, 138 F. (2d) 633; *National Labor Relations Board v. Fitzpatrick & Weller, Inc.*, 138 F. (2d) 697; *National Labor Relations Board v. Van 'Deusen*, 138 F. (2d) 893 (specifically noting the independent violation of Section 8 (1)); *National Labor Relations Board v. Louis F. Cassoff*, decided December 20, 1943; *National Labor Relations Board v. Regal Knitwear Company*, decided February 15, 1944; *National Labor Relations Board v. A. Sartorius & Co., Inc.*, decided January 31, 1944.<sup>3</sup> It may be noted in this connection that the orders in the *Nevada Consolidated Copper Co.* case,

---

<sup>3</sup> A study of the decisions of the Second Circuit Court of Appeals reveals that in the early part of 1941, shortly after the decision of this court in the *Express Publishing* case, the members of that court were divided concerning the propriety of the broad cease and desist order in any type of Board case. In *National Labor Relations Board v. Moench Tanning Co., Inc.*, 121 F. (2d) 951, 954, argued April 7, 1941, the court, composed of Judges Learned Hand, Augustus Hand and Chase,

*supra*, enforced by this Court, and the *Wilson Co.* case, in which certiorari was denied (*supra*, p. 9), occurred in cases involving respectively violations of 8 (3) and 8 (2) without independent violations of Section 8 (1).

stated that the court as then constituted did not approve the broad order. In *National Labor Relations Board v. Federbush Co., Inc.*, 121 F. (2d) 954, 957, argued April 8, 1941, the court, composed of Judges Learned Hand, Swan and Chase, stated that a majority of the court as then constituted disapproved the broad order. In *National Labor Relations Board v. Air Associates, Inc.*, 121 F. (2d) 586, 592, argued June 9, 1941, the court, composed of Judges Swan, Clark and Frank, approved the broad order, specifically pointing out that the case contained independent violations of Section 8 (1), thereby, in the opinion of the court, distinguishing the case from the *Express Publishing* case. The decision in the *Air Associates* case was handed down a week before the decisions in the *Moench Tanning* and *Federbush* cases and the court in the two latter cases felt constrained, although against its will, to follow the precedent established. However, it is apparent that this division of opinion no longer exists in connection with cases containing an independent violation of Section 8 (1). In the *Standard Oil* case, decided November 1, 1943, the court, composed of Judges L. Hand, Chase and Clark states (138 F. (2d), at 888) "It would follow that to issue an injunction under Section 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of Section 8," and bases its earlier disapproval of the broad provision on the ground that none of the earlier cases (mentioned above) contained independent violations of Section 8 (1) (a ground which, we believe, represents a present misapprehension of the facts in these cases). A comparison of the majority opinion of the court and the concurring opinion of Judge Clark seems to reveal an existing difference of opinion concerning the propriety of the broad provision in cases where no independent violation of Section 8 (1) is present. That issue is not, however, presented in the instant case.

3. The back-pay provisions of the Board's order present no issue of general importance. Paragraph 2 (b) of the order, to which petitioner objects (Pet. 27-28), provides that in case Doran does not seek reinstatement with petitioner within five days of the issuance of the order, petitioner shall make her whole from the time of her discharge to the time she received work elsewhere. The order is eminently fair and reasonable. At the time of the hearing Doran had been employed at a higher wage but in a probationary status at another plant. She hoped to be retained there as a permanent employee at the end of her probationary period; only in case she was not so retained would she desire reinstatement by petitioner. The Board's order fully effectuated the policies of the Act by providing that, in case she did not wish reinstatement (*i. e.*, in case her present employment at a higher wage proved permanent), petitioner would be required to make her whole only for the actual losses she incurred during her period of unemployment. Petitioner contends (Pet. 28) that the back-pay period should be measured, not to the time she accepted her present employment, but to the time of the offer of reinstatement. The reason for this contention is, as the court below pointed out, petitioner's desire to benefit from the fact that the rate of her earnings in the new job was larger than that paid by petitioner, by using the excess as a credit

to reduce the amount of back pay due her for her period of unemployment. In rejecting petitioner's contention the court below stated, "when she was not reinstated, the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere. The [petitioners] were no more entitled to any part of her wages during the probationary period than thereafter" (R. 362). Whether or not Doran accepts reinstatement, petitioner will not be required to pay her back wages with respect to any period for which it may not take credit for her earnings; nor is there any claim of a willful refusal of employment. Contrary to petitioner's contention (Pet. 28), the cases relied upon are thus not in point.

#### CONCLUSION

The decision below, sustaining the Board's order, is correct, and presents neither a conflict of decisions, nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,  
*Solicitor General.*

ALVIN J. ROCKWELL,  
*General Counsel,*

RUTH WEYAND,  
MARGARET M. FARMER,  
*Attorneys,*

*National Labor Relations Board.*

MARCH 1944.





## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

\* \* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization \* \* \*.

\* \* \* \* \*

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(c) \* \* \* If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. \* \* \*

